

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

COBY M. McGOWN,

Plaintiff,

CASE NO. C16-1828-MAT

V.

NANCY A. BERRYHILL, Acting
Commissioner of Social Security,

Defendant.

**ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL**

Plaintiff Coby M. McGown proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied Plaintiff's application for Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, this matter is **AFFIRMED**.

FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1987.¹ He has an 11th-grade education, and has worked as

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

1 an RV detailer, pizza deliverer, and janitor. (AR 53-54, 245.)

2 Plaintiff protectively applied for SSI in July 2013. (AR 199-214, 230.) That application
3 was denied initially and upon reconsideration, and Plaintiff timely requested a hearing. (AR 115-
4 22, 128-36.)

5 On December 22, 2014, ALJ Kimberly Boyce held a hearing, taking testimony from
6 Plaintiff and a vocational expert (VE). (AR 45-86.) On April 21, 2015, the ALJ issued a decision
7 finding Plaintiff not disabled. (AR 26-38.) Plaintiff timely appealed. The Appeals Council denied
8 Plaintiff's request for review on September 28, 2016 (AR 1-6), making the ALJ's decision the
9 final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to
10 this Court.

11 **JURISDICTION**

12 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

13 **DISCUSSION**

14 The Commissioner follows a five-step sequential evaluation process for determining
15 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
16 be determined whether the claimant is gainfully employed. The ALJ found Plaintiff had not
17 engaged in substantial gainful activity since July 10, 2013, the alleged onset date. (AR 28.) At
18 step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ
19 found severe Plaintiff's asthma, affective disorder, obsessive-compulsive disorder, attention
20 deficit hyperactivity disorder, borderline cognitive ability, and anxiety disorder. (AR 28-29.) Step
21 three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found
22 that Plaintiff's impairments did not meet or equal the criteria of a listed impairment. (AR 29-31.)

23 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess

1 residual functional capacity (RFC) and determine at step four whether the claimant has
2 demonstrated an inability to perform past relevant work. The ALJ found Plaintiff capable of
3 performing medium work, as defined in 20 C.F.R. § 416.967(c), with additional limitations. He
4 cannot perform work requiring concentrated exposure to fumes, odors, dusts, gases, and/or poor
5 ventilation. He can perform unskilled, routine, and repetitive tasks that do not require a written
6 work product or reference to written instructions. He can cope with occasional work-setting
7 changes and occasional interaction with supervisors. He can perform work that does not require
8 interaction with the general public as an essential element of the job, but occasional, incidental
9 contact with the general public is not precluded. (AR 31.)

10 Plaintiff does not have any past relevant work, so the ALJ proceeded to step five, where
11 the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the
12 capacity to make an adjustment to work that exists in significant levels in the national economy.
13 With the assistance of the VE, the ALJ found Plaintiff capable of performing representative
14 occupations, including clean-up worker/janitor, laundry worker, and cleaner housekeeper. (AR
15 36-37.)

16 This Court's review of the ALJ's decision is limited to whether the decision is in
17 accordance with the law and the findings supported by substantial evidence in the record as a
18 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
19 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
20 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
21 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
22 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
23 2002).

1 Plaintiff argues the ALJ erred in (1) discounting his subjective testimony, and (2) assessing
2 the medical opinion evidence, and that these errors should be remedied by a remand for a finding
3 of disability, or, in the alternative, further proceedings. Dkt. 14 at 1-2. The Commissioner argues
4 that the ALJ’s decision is supported by substantial evidence and should be affirmed, and that if it
5 is remanded, it should be remanded for further proceedings.

6 Plaintiff’s subjective testimony

7 The ALJ discounted Plaintiff’s subjective testimony for several reasons: (1) his allegations
8 were contradicted by the medical evidence, (2) he made inconsistent statements regarding his
9 limitations, (3) his activities are inconsistent with his alleged limitations, (4) he was not using his
10 asthma medication as prescribed, and (5) his hearing testimony suggested a secondary gain
11 motivation for seeking benefits. (AR 32-34.) In the Ninth Circuit, an ALJ’s reasons to discount
12 a claimant’s subjective statements must be clear and convincing. *Burrell v. Colvin*, 775 F.3d 1133,
13 1136-37 (9th Cir. 2014).

14 Plaintiff characterizes the ALJ’s findings as “brief” and “boilerplate,” and argues that his
15 “statements about his activities and purported inconsistencies in [his] statements [regarding]
16 interacting with others at work in the past cannot be the sole factors for finding the claimant not
17 disabled.” Dkt. 14 at 17.

18 As an initial matter, Plaintiff is incorrect that inconsistent statements and activities cannot
19 support an ALJ’s rejection of a claimant’s subjective testimony. *See Orn v. Astrue*, 495 F.3d 625,
20 639 (9th Cir. 2007) (activities may undermine credibility where they (1) contradict the claimant’s
21 testimony or (2) “meet the threshold for transferable work skills”); *Burch v. Barnhart*, 400 F.3d
22 676, 680 (9th Cir. 2005) (ALJ appropriately considers inconsistencies in claimant’s testimony
23 when weighing those statements).

1 Furthermore, the ALJ in this case did not rely solely on evidence related to Plaintiff's
2 activities and his inconsistent statements related to why his previous jobs ended. The ALJ also
3 detailed contradiction with the medical record, non-compliance with medication, and secondary
4 gain concerns in light of Plaintiff's testimony that he hoped to use his benefits payments to
5 purchase a camera and sell photography. (AR 32-24.) Those unchallenged² reasons support the
6 ALJ's findings regarding Plaintiff's subjective testimony. *See Carmickle v. Comm'r of Social Sec.*
7 *Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction with the medical record is a sufficient
8 basis for rejecting the claimant's subjective testimony."); *Molina v. Astrue*, 674 F.3d 1104, 1113-
9 14 (9th Cir. 2012) (holding that an ALJ may rely on an unexplained or inadequately explained
10 failure to seek or follow treatment recommendations, in evaluating a claimant's subjective
11 testimony); *Burrell*, 775 F.3d at 1139-40 (holding that an ALJ may consider a claimant's
12 secondary gain motivation in evaluating the claimant's subjective statements).

13 Therefore, even if, as Plaintiff contends, the ALJ erred in relying on evidence related to his
14 activities and inconsistent statements about his social limitations, the ALJ's other reasons support
15 the ALJ's discounting of Plaintiff's subjective statements and remain valid despite the erroneous
16 reasons. Any error is therefore harmless. *See Carmickle*, 533 F.3d at 1162-63.

17 Medical opinion evidence

18 Plaintiff challenges the ALJ's assessment of medical opinion evidence, specifically

20

21 ² Plaintiff argues that the ALJ misconstrued his hearing testimony about his desire to use his
22 benefits payments to buy a camera to further a photography career, calling this testimony "wishful
23 statements[,]" but not evidence that he could perform full-time work. Dkt. 14 at 17. The ALJ did not cite
this testimony as evidence of an ability to perform full-time work, but as evidence of a secondary gain
motivation. (See AR 33 (referencing AR 65).) Thus, to the extent that Plaintiff does challenge the ALJ's
reliance on this testimony, Plaintiff's arguments are not persuasive.

1 opinions provided by treating³ psychologist Harriet Yurchak, Ph.D., MSW. (AR 338-43, 354-59,
2 434-.) The ALJ gave little weight to Dr. Yurchak's opinions because her conclusions were not
3 "adequately reconcil[ed]" with the medical evidence or Plaintiff's activities, and instead appear to
4 rely on Plaintiff's self-reporting. (AR 35.) The ALJ found that Dr. Yurchak's opinions also
5 contain generalized statements that are inconsistent with the record, and that she referred to her
6 own treatment notes (which she refused to provide) as "very general." (AR 35.) The ALJ noted
7 that although Dr. Yurchak offered an opinion about Plaintiff's physical functioning, she neither
8 treated nor evaluated his physical health. (*Id.*) The ALJ also found that Dr. Yurchak's opinions
9 addressed a timeframe beyond the scope of the adjudicated period; Dr. Yurchak referenced
10 limitations that existed when Plaintiff was in grade school. (*Id.*) Lastly, the ALJ found that Dr.
11 Yurchak's opinions addressed the least, rather than the most, Plaintiff can do, and the opinions
12 therefore have limited relevance for determining Plaintiff's RFC. (*Id.*)

13 Plaintiff also challenges the ALJ's assessment of an opinion written by examining
14 psychologist Margaret Cunningham, Ph.D. (AR 299-317.) The ALJ gave little weight to Dr.
15 Cunningham's opinion because she found it inconsistent with Plaintiff's ability to play basic and
16 complex video games on a daily basis, interact with others via computer, and maintain a romantic
17 relationship for two years. (AR 34-35.) The ALJ also found that Dr. Cunningham accepted nearly
18 all of Plaintiff's self-reports at face value, which is problematic because the ALJ found that
19 Plaintiff's self-report was not entirely credible. (AR 35.) The ALJ found that greater weight

20

21 ³ Plaintiff notes that the ALJ erroneously referred to Dr. Yurchak as a consultative provider, rather
22 than a treating provider. (*See* AR 35.) The ALJ did, however, reference Dr. Yurchak's description of her
23 treatment records (AR 35 (citing AR 447)), which indicates that the ALJ was aware of Dr. Yurchak's true
status. Furthermore, this scrivener's error is harmless because the same standard would apply to Dr.
Yurchak's opinions whether she was a treating or examining source. The Commissioner argued the same
in her brief (Dkt. 15 at 6 n.3) and Plaintiff did not file a reply brief.

1 should be given to the State agency reviewing consultants, who had access to more of the record.
2 (*Id.*)

3 In general, more weight should be given to the opinion of a treating physician than to a
4 non-treating physician, and more weight to the opinion of an examining physician than to a non-
5 examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Where not contradicted
6 by another physician, a treating or examining physician's opinion may be rejected only for ““clear
7 and convincing”” reasons. *Id.* (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)).
8 Where contradicted, a treating or examining physician's opinion may not be rejected without
9 ““specific and legitimate reasons’ supported by substantial evidence in the record for so doing.””
10 *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

11 The ALJ provided specific and legitimate reasons to discount Dr. Yurchak's opinions. Dr.
12 Yurchak described Plaintiff as unable to interact with co-workers or maintain attention and
13 concentration for extended periods of time (AR 354-55), yet Plaintiff maintained a two-year-long
14 romantic relationship, interacted with people on social media, played video games every day,
15 followed recipes to cook meals, visited the library, and used a digital camera. (See AR 56, 60-63,
16 65-67, 223, 226.) The ALJ did not err in finding these activities to be inconsistent with the
17 limitations indicated by Dr. Yurchak.

18 Dr. Yurchak's opinion reports are also replete with quotations from Plaintiff's self-report
19 as well as summaries of his self-report. (AR 339-43, 357-59, 436-40.) In light of the ALJ's proper
20 finding that Plaintiff's subjective testimony is not entirely credited (for the reasons explained
21 *supra*), the ALJ did not err in discounting Dr. Yurchak's opinions for their reliance on Plaintiff's
22 self-reporting. *See Bray v. Comm'r of Social Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir. 2009)
23 (“As the district court noted, however, the treating physician's prescribed work restrictions were

1 based on Bray's subjective characterization of her symptoms. As the ALJ determined that Bray's
2 description of her limitations was not entirely credible, it is reasonable to discount a physician's
3 prescription that was based on those less than credible statements.").

4 The ALJ also noted that Dr. Yurchak addressed Plaintiff's physical functioning, even
5 though she did not treat his physical symptoms or perform any testing. (See AR 339-40, 435.) Dr.
6 Yurchak also referenced unspecified physical "challenges" that render Plaintiff unable to work.
7 (AR 343, 436.) The ALJ did not err in finding that Dr. Yurchak lacked the foundation to address
8 Plaintiff's physical functioning. *See* 20 C.F.R. § 416.927(c)(2)(ii) (providing that an ALJ may
9 consider a provider's area of expertise in evaluating his or her opinion).

10 The ALJ also did not err in finding that Dr. Yurchak's references to limitations that existed
11 during Plaintiff's childhood were not probative as to the ALJ's inquiry, or that Dr. Yurchak's
12 opinions did not address the most that Plaintiff could do. Because an RFC assessment represents
13 that the most a claimant can do during the adjudicated period (see Social Security Ruling 96-8p,
14 1996 WL 374184 (Jul. 2, 1996)), the ALJ properly considered the relevance of Dr. Yurchak's
15 conclusions in light of the scope of the ALJ's inquiry.

16 For all of these reasons, the ALJ did not err in discounting Dr. Yurchak's opinions.
17 Although Plaintiff suggests that the contrary State agency opinions do not justify discounting Dr.
18 Yurchak's opinions (Dkt. 14 at 11), the ALJ did not cite State agency opinions as a reason to
19 discount Dr. Yurchak's opinions. Instead, the ALJ provided specific, legitimate reasons to do so,
20 and accordingly, did not err.

21 Similarly, the ALJ did not err in discounting Dr. Cunningham's opinion, which was
22 rendered after a one-time evaluation without access to other records. (See AR 299.) The ALJ
23 identified Plaintiff's activities that were inconsistent with the limitations specified by Dr.

1 Cunningham (AR 35), and Dr. Cunningham's opinion report was replete with quotations from and
2 references to Plaintiff's self-report. (See AR 299-303.) Although some sections of Dr.
3 Cunningham's report referenced clinical findings, the ALJ did not err in discounting the parts that
4 referenced only Plaintiff's self-report. (AR 34-35.) These are specific, legitimate reasons to
5 discount Dr. Cunningham's report.

6 Although Plaintiff argues the ALJ erred in affording significant weight to State agency
7 opinions because they were rendered at a time when the record was not complete (Dkt. 14 at 14),
8 the ALJ explicitly and appropriately considered whether those opinions were considered with the
9 remainder of the objective evidence as well as Plaintiff's activities. (AR 34.) Accordingly,
10 Plaintiff has not shown that the ALJ erred in assessing the opinions of Drs. Yurchak or
11 Cunningham, or the State agency consultants. The ALJ's assessment of the medical opinion
12 evidence is affirmed.

13 **CONCLUSION**

14 For the reasons set forth above, this matter is AFFIRMED.

15 DATED this 12th day of July, 2017.

16
17 
18 Mary Alice Theiler
19 United States Magistrate Judge
20
21
22
23